IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

WEDNESDAY, THE 31ST JANUARY 2007 / 11TH MAGHA 1928

SA.No. 83 of 1993(B)

AS.13/1989 of SUB COURT, OTTAPPALAM
OS.209/1986 of MUNSIFF COURT, OTTAPPALAM

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APPELLANTS/APPELLANTS/PLAINTIFFS:

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1. RAMAN, S/O. NARAYANAN EZHUTHASSAN,
   AGED 65 YEARS, RESIDING AT EZHUVATHALA AMSOM AND
   DESOM OTTAPALAM TALUK. (DIED)
2. MALUKUTTY AMMA, W/O. RAMAN,
   AGED 55 YEARS, RESIDING AT
   -DO- -DO-

*ADDL.APPELLANTS

3. V.R. VALSALA DEVI, 38 YEARS,
   W/O. SANKARA NARAYANAN, NAGARIKKUNNATH HOUSE,
   KARAMANAMKURUSSI P.O.,
   VELLINEZHI (VIA).
4. V.R. SURESH KUMAR, 36 YEARS, S/O. LATE RAMAN,
   VILLATH HOUSE, EZHUVANTHALA P.O.,NELLAYA (VIA).
5. V.R. RAMANI, 33 YEARS, W/O. K.BALAKRISHNAN,
   KALATHODI VEEDU, THATHANAMPALLY P.O.
   VILAYOOR (VIA).
6. V.R. SANTHAJ\KUMARI, 29 YEARS, W/O. UNNIKRISHNAN,
   DEVASWOMPARAMBIL, MANNANNUR P.O.,
   KAVALAPPURA (VIA).
7. AMITHAKUMARI V.R., 25 YEARS, W/O. HARIDASAN,
   CHETTIYAMTHODI HOUSE, CHERUKARA P.O.,
   PERINTHALMANNA (VIA).

* (L.Rs OF THE DECEASED 1st APPELLANT ARE IMPLEADED AS ADDL.APPELLANTS 3 TO 7 AS PER ORDER DATED 30.7.02 ONC.M.P.1064/02.)

BY ADV. SRI.M.CHATHUKUTTY NAMBIAR
SMT.RATHY R.PANICKER
SRI.M.CHATHUKUTTY NAMBIAR
SRI.T.V.JAYAKUMAR NAMBOODIRI

S.A.83/1993.

RESPONDENTS/RESPONDENTS/DEFENDANTS:
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1. MOIDUNNI, S/O. PARAKAMIYIL MUHAMMED,
   AGED 28 YEARS, RESIDING AT EZHUVATHALA
   AMSOM AND DESOM OF OTTAPPALAM TALUK.
2. UNNIKRISHNAN,
   S/O. THACHU EZHUTHASSAN,
   AGED 39 YEARS, RESIDING AT
   -DO- -DO-

BY ADV. SRI.P.N.RAVINDRAN
SMT.PREETHY KARUNAKARAN
SMT.MEENA.A.
SMT.M.R.MINI
SRI.JAYKAR.K.S.

THIS SECOND APPEAL HAVING BEEN FINALLY HEARD ON 31/01/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

S.A.83/1993.

ORDER ON C.M.P.NO.1858/1994IN S.A.83/93

DISMISSED.

31.1.07. SD/-M.SASIDHARAN NAMBIAR, JUDGE.

M.SASIDHARAN NAMBIAR, J.

S.A. 83 OF 1993.

JUDGMENT

31.01.07.

M.SASIDHARAN NAMBIAR,J.

S.A.NO.83 OF 1993

DATED THIS THE 31st DAY OF JANUARY, 2007

JUDGMENT

Appellants are plaintiffs in O.S.209/1986 on the file of Munsiff Court, Ottapalam. Respondents are defendants. Suit was filed for mandatory and permanent prohibitory injunction. Plaint 'A' schedule property belongs to appellants. Plaint 'B' schedule property belongs to second respondent. Plaint 'C' schedule property was purchased by appellants under Ext.A2 sale deed on 10.4.1974.

2. Case of appellants was that the plaint 'B' and 'C' schedule properties were being used as a way to the plaint 'A' schedule property for the last more than twenty one years as of right as an easement peaceably, openly and without interruption and the appellants thereby prescribed a right of easement by prescription over plaint 'B' schedule property contending that respondents have no right to use the plaint 'B' schedule property or to cause any obstruction for the use of plaint 'B' and 'C' schedule properties. Appellants sought a decree for permanent prohibitory injunction contending that respondents put up an open fence into the plaint 'B' schedule way. It was contended that respondents have no right to use the plaint 'B' schedule way and

therefore a mandatory injunction is to be granted to close the fence. A decree for permanent prohibitory injunction was sought restraining respondents from interfering with the possession of plaint 'B' and 'C' schedule properties or trespassing into the said properties. Respondents in the written statement contended that second respondent sold a portion of the property on the south western corner of his property to first respondent and second respondent has been using plaint 'C' schedule property as a way without obstruction even prior to 1974 and respondents have prescribed a right of easement over the plaint 'C' schedule property and appellants have no absolute right or possession over plaint 'C' schedule property and appellants are not entitled to the decree sought for.

3. Learned Munsiff on the evidence of Pws 1 and 2 and DW1 and Exts.A1 to A3, B1, C1 and C2 found that appellants have established their right to use the way by easement of prescription over plaint 'B' schedule property. It was also found that evidence establish that plaint 'C' schedule property was being used as a way, even before appellants purchased the property under Ext.A2 sale deed and respondents have a right to use the way and appellants are not entitled to obstruct the said usage. The suit was decreed partly and respondents were restrained from interfering with the use of plaint 'B' and 'C' schedule properties by appellants. As per the decree, respondents have a right to use the plaint 'C' schedule

property as a way. Appellants challenged the decree and judgment before Sub Court, Ottapalam in A.S.13/1989.

4. Learned Sub Judge on re-appreciation of the facts and evidence confirmed the finding of learned Munsiff that the respondents have a right to use plaint 'C' schedule way and dismissed the appeal. It is challenging the concurrent decree and judgment, second appeal was filed.

5. It is seen that when the appeal was admitted and notice to respondents were issued, no substantial question of law was formulated. In the appeal memorandum, the substantial question of law formulated by the appellants was whether a right of easement by prescription can be granted without specific pleading on the ingredients of the right of easement by prescription.

6. Learned Counsel appearing for appellants and respondents were heard.

7. Ext.C1 plan shows that Panchayat road is lying north west and plaint 'C' schedule property which is admittedly being used as a way starts from panchayat road, runs towards the north and joins plaint 'B' schedule property. The plaint 'B' schedule property, which is the southern portion of the property of second defendant runs east west and thereafter turns towards north and reaches plaint 'A' schedule property, where the appellants reside. The property purchased by first respondent from second respondent lies to the east of that way, which is the south eastern portion of plaint

'B' schedule property. Plaint 'B' schedule property belongs to second respondent. Plaint 'C' schedule property was purchased by appellants under Ext.A2 sale deed in 1974. The residential building in the plaint 'A' schedule property was constructed in 1973. It is the admitted case that even before plaint 'C' schedule property was purchased by appellants, it was being used as a way leading to plaint 'A' schedule property.

8. Learned Munsiff on the evidence found that appellants have a right of easement by prescription over plaint 'B' schedule property and plaint 'B' schedule property connects the plaint 'C' schedule property to plaint 'A' schedule property. Right of easement by prescription upheld over plaint 'B' schedule property was not challenged by respondents. The title of appellants to plaint 'C' schedule property was also not disputed. The only question is whether respondents have a right to use plaint 'C' schedule property as a way. The suit is one for injunction. Case of appellants in the plaint itself is that plaint 'C' schedule property was being used as a way even before it was purchased in 1974. Learned Munsiff and Learned Sub Judge on the evidence found that even before the purchase of plaint 'C' schedule property by appellants, plaint 'C' schedule property was being used as a way not only by appellants but others also. It is a finding of fact based on the evidence on record. Evidence establish that fact. Hence that concurrent finding of fact cannot be disturbed in exercise of the powers under Section

100 of Code of Civil Procedure.

9. Learned Counsel appearing for appellants vehemently argued that there is no admission that respondents were using it as a way. Learned Munsiff and learned Sub Judge on appreciation of evidence of appellants found that plaint 'C' schedule property was being used not only by appellants but others also as a way even before it was purchased in 1974. Learned Munsiff and learned Sub Judge on the evidence found that respondents were also using that as a way.

10. Arguments of learned Counsel appearing for appellants is that when the appellants filed the suit seeking a decree for injunction, respondents are not entitled to get any relief in their favour, without seeking a decree for declaration of their right. On the facts of this case as rightly found by Courts below, it is not necessary for respondents to seek any such declaration when appellants sought a decree for permanent prohibitory injunction restraining respondents from using the way, when evidence establish that even before the purchase of plaint 'C' schedule property by appellants, it was being used as a way not only by appellants but others also including respondents. Appellants are setting up exclusive possession over plaint 'C' schedule property and seeking a decree for injunction. In such a case Court is bound to consider the case of respondents that appellants are not in exclusive possession of the property and it was being used as a way

by all others. That case of the respondents is strengthened by the case of appellants that plaint 'B' schedule property belonging to second respondent was being used as a way and that too as a continuation of plaint 'C' schedule way from 1955 onwards.

11. Case of appellants is that plaint 'C' schedule property was purchased under Ext.A2 sale deed in 1974 and they are the absolute owners and nobody else have a right to use the same. If the evidence establish that appellants are not in exclusive possession of plaint 'C' schedule property and others have been using it as a way openly and peaceably for the last several decades, appellants are not entitled to the decree for permanent prohibitory injunction restraining others including respondents from using plaint 'C' schedule property as a way. If that be so even without a claim for declaratory decree by respondents the question whether appellants are in exclusive possession of the property is to be decided. Unless it is established that appellants are in exclusive possession of property, they are not entitled to the decree sought for.

12. Learned Munsiff and learned Sub Judge on the evidence found that appellants are not in exclusive possession of plaint 'C' schedule property and it was being used by others also as a way even before appellants purchased the property and even thereafter. If that be so, for that sole reason appellants are not entitled to a decree for injunction against the respondents.

13. Learned Counsel relying on the decision of the Apex Court in **Justiniano Antao and others Vs. Bernadette B. pereira (smt)(2005(1)SCC 471)** argued that when a right of easement by prescription is claimed, the person claiming the right has to establish from which period onwards the right was being exercised openly, peaceably, as of right and without obstruction and that too for more than the requisite period of twenty years. The principle is well settled.

14. Learned Munsiff and learned Sub Judge on the evidence found that plaint 'C' schedule property was being used as a way not only by appellants but by others also from 1955 onwards and it was openly, peaceably, as of right and without obstruction. That finding of the fact, cannot be interfered in the second appeal. As no decree for declaration was sought, absence of a specific plea that the way was being used as of right is not fatal. There is no substantial question of law involved in the appeal.

I find no merit in the second appeal. It is dismissed.

M.SASIDHARAN NAMBIAR,JUDGE

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